



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 174911

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Pursuant to petition filed June 10, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, July 26, 2016 at 09:00 AM at , Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Office of the Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
████████████████████  
████████████████████

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**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. The respondent (CARES # ██████████) is a resident of Milwaukee County who received FS benefits in Milwaukee County from October 1, 2011 through July 31, 2015.
2. On or about October 9, 2013, the respondent applied for FS benefits. He reported a household size of one and reported no household income and no employment.

3. On October 16, 2013, the agency issued a Notice of Decision to the respondent informing him that that he was approved to receive FS benefits of \$148 for October, 2013 and \$189/month effective November 1, 2013. The notice informed him that this was based on reported income of \$0. The notice also informed him of the requirement to report to the agency within 10 days if he had a new source of income or a change in job or self-employment.
4. Respondent was employed with [REDACTED] from January 20, 2014 – February 2, 2014. He earned gross wages of \$80.
5. On or about April 14, 2014, the respondent completed a FS renewal. He reported no change in employment status and no household income.
6. On April 15, 2014, the agency issued a Notice of Decision to the respondent informing him that he would receive FS benefits of \$107 for April, 2014 and \$189/month effective May 1, 2014. The notice informed him that this was based on reported income of \$0. The notice also informed him of the requirement to report to the agency within 10 days if he had a new source of income or a change in job or self-employment.
7. Respondent was employed with [REDACTED] from October 14, 2014 – October 28, 2014. He earned gross wages of \$950.
8. On or about October 22, 2014, the respondent completed a FS renewal. He reported no change in employment status and no household income.
9. On October 23, 2014, the agency issued a Notice of Decision to the respondent informing him that he would receive FS benefits of \$62 for October, 2014 and \$194/month effective November 1, 2014. The notice informed him that this was based on reported income of \$0. The notice also informed him of the requirement to report to the agency within 10 days if he had a new source of income or a change in job or self-employment.
10. On or about March 3, 2015, the agency received information that the respondent is employed at [REDACTED] and has been for 10 years. According to case comments, the agency obtained information that wages were reported for the respondent from [REDACTED] for two quarters. A request for employment/income was issued to [REDACTED]. No verification was received.
11. On March 3, 2015, the agency issued a request to the respondent for tax returns for the period of 2009 – 2013. The due date for the information was March 13, 2015. The respondent did not respond to the request.
12. On or about May 4, 2015, the respondent completed a FS renewal. He reported no change in employment status and no household income.
13. On May 5, 2015, the agency issued a Notice of Decision to the respondent informing him that he would receive FS benefits of \$175 for May, 2015 and \$194/month effective June 1, 2015. The notice informed him that this was based on reported income of \$0. The notice also informed him of the requirement to report to the agency within 10 days if he had a new source of income or a change in job or self-employment.
14. On June 25, 2015, the agency issued a Notice of Proof Needed requesting verification of respondent's income and employment at [REDACTED]. The due date for the information was July 6, 2015.
15. On or about December 21, 2015, the respondent completed a FS renewal. He reported employment with [REDACTED] with a start date of March 1, 2014. He reported working 40 hours/pay period at \$10/hour. He also reported that this employment had ended more than 30 days ago.
16. On June 23, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent intentionally misrepresented income in order to receive FS benefits.
17. The respondent failed to appear for the scheduled July 26, 2016 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

## DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;  
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. The respondent’s employment at [REDACTED] and [REDACTED] lasted only two weeks at each employer. The reporting requirements are to report employment to the agency within 10 days. With regard to those two failures to report, I might not have concluded that the respondent intentionally failed to report these short-term periods of employment; however, the respondent was actually employed at [REDACTED] at the time he completed a renewal in October, 2014 and he failed to report his current employment. The agency did not present evidence to demonstrate the time of respondent’s employment at [REDACTED]. The respondent reported starting on or about March 1, 2014 and he reported on December 21, 2015 that his employment there ended more than 30 days ago. The case comments indicate that there were only quarters of reported wages from [REDACTED] but there was no evidence when those two quarters of wages were reported. The agency representative testified that the respondent may have worked as a self-employed contractor but there is no evidence to demonstrate that this was the case. The agency did request employment and income verification from [REDACTED] and the respondent. Neither of those parties provided any information about his employment at [REDACTED]. The evidence does demonstrate that the respondent did not report employment or income from [REDACTED] at any time between March 1, 2014 and December 21, 2015. During that time, he completed three FS renewals and was made aware of reporting requirements as well as sanctions for failing to report accurately. Based on the evidence, I conclude that the agency has met its burden to demonstrate that the respondent intentionally committed a program violation by not accurately reporting his employment and income when applying for FS benefits. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rule specifying that an applicant/recipient must accurately report household income.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE,** it is

**ORDERED**

That the petitioner’s determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

## REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

## APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

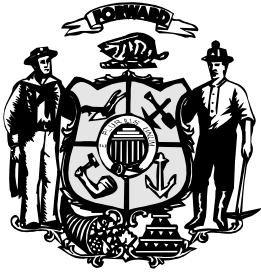
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 31st day of August, 2016

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\sDebra Bursinger  
Administrative Law Judge  
Division of Hearings and Appeals

c: Office of the Inspector General - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
[REDACTED] - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on August 31, 2016.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@wisconsin.gov